Goh Cheng Teik & Anor v Syarikat Goh Guan Ho & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22–426–93
JEFFREY TAN JC
20 SEPTEMBER 1996

Land Law *— Conveyancing — Transfer of land under Conveyancing and Law of Property Ordinance (Cap 118) — Whether formal conveyance was the instrument which effected the passing of the legal estate — Effect of memorial on register of dealings*

Evidence *— Burden of proof — Fraud alleged in civil case — Plaintiffs producing only unstamped copy of indenture — Whether plaintiffs had proved beyond reasonable doubt that signature on indenture was not that of the deceased*

Trusts and Trustees *— Administration of estate — Personal representatives of deceased bringing action on behalf of deceased — Neither consent of beneficiaries nor direction of court obtained — Action clearly unmaintainable — Whether personal representatives to bear costs personally*

The plaintiffs claimed that an indenture dated 27 January 1965 ('the indenture') that brought about the conveyance of four pieces of land ('the lands') was not that of their late father ('the deceased'), the owner of the lands at the material time, and sought relief: (i) to set aside the conveyance to the second defendant; (ii) to set aside the transfer of title of the lands by the second defendant to the third defendant; and (iii) to reconvey the lands to the estate of the deceased. The first plaintiff claimed that he had opened the safe in his parents' shop and discovered, inter alia, documents concerning the lands, namely: (a) the second defendant's letter to Syarikat Goh Guan Ho agreeing to purchase the lands at the price of RM26,000; (b) a sale and purchase agreement dated 14 November 1964; and (c) a letter dated 19 March 1965 from Syarikat Goh Guan Ho to the second defendant forwarding the mortgagee's deed of reconveyance of the lands. The second plaintiff claimed that the three Chinese hieroglyphic characters on the photocopy of an unstamped copy of the indenture, obtained following a title search on the lands, was not the usual signature of the deceased. The plaintiffs were, however, not able to produce the original indenture, the validity of which they challenged in this action. The main issue for consideration was whether the indenture was a valid instrument.

Held, dismissing the plaintiffs' claim:

(1) Under the Conveyancing and Law of Property Ordinance (Cap 118) applicable to the state of Penang prior to the coming into force of the National Land Code 1965, the execution of a formal conveyance acted to pass a legal estate of the vendor to the purchaser whilst the registration of a dealing acted merely as a

public record of the transaction and was ineffectual to create an estate in land. A vendor's title was ascertained by an investigation of all dealings with a title back for 40 years (later amended to 30) and if any document in the chain of title over this period was missing or invalid, a purchaser could not obtain a good title even if the purchaser had registered a memorial evidencing the conveyance (see p 411E–F).

(2) The unstamped indenture obtained following a title search taken from the register of dealings was a memorial, a record of a conveyance, but not the conveyance that passed the deceased's title to the second defendant (see pp 411I–412A).

(3) The judgment that the plaintiffs sought was dependent on the existence of the fact that the indenture was not executed by the deceased. The plaintiffs had the burden of proof and as there was an allegation of fraud, the proof required was not of a civil standard but that of beyond a reasonable doubt that the signature on the indenture was not that of the deceased. Nevertheless, the plaintiffs were not able to produce the original indenture. However conclusive the proof that the unstamped indenture was not executed by the deceased was not sufficient proof that the deceased had not executed the indenture, which according to the law was the effective instrument to convey the lands. Therefore, based on the facts and circumstances of the case, the plaintiffs had not made out an arguable case even on the balance of probabilities (see p 414D–F); *Saminathan v Pappa* [1981] 1 MLJ 121 and *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 followed.

(4) It was advisable for a personal representative to obtain the consent of all the beneficiaries or to seek the court's direction before bringing or defending an action. In this case, the plaintiffs were holders of letters of adminsitration de bonis non and brought the action as representatives of the deceased. Considering that the beneficiaries' consent was not shown and the court's sanction was not obtained for this action which was 'conspicuously unmaintainable', the costs of this proceedings should be paid by the plaintiffs personally (see p 420A–C); *Ganapathy Chettiar v Periakaruppan & Anor* [1962] MLJ 207 followed.

[Bahasa Malaysia summary

Plaintif telah menuntut bahawa suatu indentur bertarikh 27 Januari 1965 ('indentur tersebut') yang telah menghasilkan pemindahhakan empat bidang tanah ('tanah tersebut') bukannya indentur yang dilaksanakan oleh mendiang bapa mereka ('si mati'), tuan punya tanah tersebut pada masa yang material, dan memohon relief supaya: (i) pemindahhakan kepada defendan kedua harus diketepikan; (ii) pemindahan hakmilik tanah tersebut oleh defendan kedua kepada defendan ketiga diketepikan; dan (iii) tanah tersebut dipindahhak semula kepada harta pusaka si mati. Plaintif pertama telah mendakwa

bahawa dia telah membuka peti besi di kedai ibubapanya dan telah mendapati, antara lain, dokumen-dokumen berkaitan dengan tanah tersebut, iaitu: (a) surat defendan kedua kepada Syarikat Goh Guan Ho di mana ia bersetuju membeli tanah tersebut pada harga RM26,000; (b) perjanjian jual-beli bertarikh 14 November 1964; dan (c) sepucuk surat bertarikh 19 Mac 1965 dari Syarikat Goh Guan Ho kepada defendan kedua mengemukakan suratikatan pemindahhakan semula pemegang gadai janji tanah tersebut. Plaintif kedua telah mendakwa bahawa tiga huruf hiroglifik Cina atas salinan fotostat indentur tersebut yang tidak diterakan, yang diperolehi berikutan carian hakmilik ke atas tanah tersebut, bukanlah tandatangan biasa si mati. Plaintif, namun demikian, tidak dapat mengemukakan indentur asal, yang kesahannya dicabar dalam tindakan ini. Isu utama untuk dipertimbangkan adalah sama ada indentur tersebut adalah instrumen yang sah.

Diputuskan, menolak tuntutan plaintif:

(1) Di bawah Ordinan Pindahhak dan Undang-Undang Harta (Bab 118) yang terpakai kepada negeri Pulau Pinang sebelum Kanun Tanah Negara 1965 dikuatkuasakan, perlaksanaan pindahhakan yang formal bertindak untuk memindahkan harta sah penjual di sisi undang-undang kepada pembeli padahal pendaftaran satu urusan bertindak hanya sebagai rekod awam transaksi tersebut dan ianya tidak berkesan untuk mewujudkan estet dalam tanah. Hakmilik penjual adalah ditentukan oleh siasatan kesemua urusan dengan hakmilik yang boleh dikesan sejak 40 tahun dahulu (kemudiannya telah dipinda kepada 30 tahun) dan jikalau sesuatu dokumen dalam rantaian hakmilik dalam tempoh masa tersebut didapati hilang ataupun tidak sah, seseorang pembeli itu tidak akan mendapat hakmilik yang sah walaupun pembeli telah mendaftarkan memorial yang membuktikan pindahhakan tersebut (lihat ms 411E–F).

(2) Indentur yang tidak diterakan yang diperolehi berikutan carian hakmilik yang diambil daripada daftar urusan adalah satu memorial, satu rekod suatu pindahhakan, tetapi bukan pindahhakan yang memindahkan hakmilik si mati kepada defendan kedua (lihat ms 411I–412A).

(3) Penghakiman yang dipohon oleh plaintif bergantung kepada kewujudan fakta bahawa indentur tersebut telah tidak disempurnakan oleh si mati. Plaintif memikul beban pembuktian dan oleh kerana terdapat dakwaan fraud, bukti yang diperlukan bukanlah darjah pembuktian sivil tetapi ianya adalah bukti tanpa keraguan yang munasabah bahawa tandatangan atas indentur tersebut bukanlah tandatangan si mati. Namun demikian, plaintif tidak dapat mengemukakan indentur asal. Betapa konklusif sekalipun bukti bahawa indentur yang tidak diterakan itu tidak dilaksanakan oleh si mati bukanlah bukti yang mencukupi bahawa

si mati tidak melaksanakan indentur tersebut, yang mengikut undang-undang adalah instrumen yang berkesan untuk memindahkan tanah tersebut. Oleh itu, berdasarkan fakta-faka dan keadaan kes, plaintif tidak berjaya membuktikan kes mereka biarpun atas imbangan kebarangkalian (lihat ms 414D–F); *Saminathan v Pappa* [1981] 1 MLJ 121 dan *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 diikut.

(4) Adalah dinasihatkan bahawa seseorang wakil diri mendapat persetujuan kesemua benefisiari atau memohon arahan mahkamah sebelum memulakan atau mempertahankan suatu tindakan. Dalam kes ini, plaintif merupakan pemegang surat pentadbiran de nonis non dan membawa tindakan ini sebagai wakil si mati. Memandangkan bahawa persetujuan benefisiari tidak ditunjukkan dan kebenaran mahkamah tidak diperolehi untuk tindakan ini yang jelasnya tidak boleh berjaya, kos prosiding ini harus dibayar oleh plaintif sendiri (lihat ms 420A–C); *Ganapathy Chettiar v Periakaruppan & Anor* [1962] MLJ 207 diikut.]

Notes

For cases on allegation of fraud in a civil case, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 286–297.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Ngu Kie Chi & Anor [1991] 3 CLJ 2848 (refd)

Chiat Kian Rubber Works Sdn Bhd v Southern Finance Co Bhd & Anor [1992] 1 CLJ 402 (refd)

Choo Ah Pat v Chow Yee Wah [1974] 1 MLJ 62 (refd)

Choo Eng Choon (deceased), Re, Choo Ang Chee v Neo Chan Neo & Ors (1908) 12 SSLR 120 (refd)

Dr K Shanmuganathan v Periasamy s/o Sithambaram [1994] 2 CLJ 225 (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 (folld)

Ganapathy Chettiar v Periakaruppan & Anor [1962] MLJ 207 (folld)

Karpal Singh v Atip bin Ali [1987] 1 MLJ 291 (refd)

Malayan Banking Bhd v Chua Keng Leng t/a New Fortune Enterprise [1991] 3 CLJ 2522 (refd)

Ng Yik Seng & Anor v Perwira Habib Bank Bhd [1980] 2 MLJ 83 (refd)

PP v Kek Leong Peng [1992] 1 CLJ 696 (refd)

PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 (refd)

Ramli bin Kechik v PP [1986] 2 MLJ 33 (refd)

Ratten v R [1972] AC 378 (refd)

Saminathan v Pappa [1981] 1 MLJ 121 (folld)

Subramaniam v PP [1956] 1 WLR 965 (refd)

Teng Kum Seng v PP [1960] MLJ 225 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 18(2)
Conveyancing and Law of Property Ordinance (Cap 118)
Evidence Act 1950 ss 45(1), (2), 65(1)(a), (b), (c), (d), 73, 101, 102, 103, 114(e)
National Land Code 1965
National Land Code (Penang and Malacca Titles) Act 1963 ss 31, 76
Rules of the High Court 1980 O 35 r 11
Registration of Deeds Ordinance (Cap 121) s 15

Tan Beng Hong (*Ooi Teik Hoe* with him) (*Ooi Lee & Co*) for the plaintiffs.
Khoo Eng Chin (*Khoo & Sidhu*) for the first defendant.
Mohd Aslam bin Mohd Mydin (*Presgrave & Matthews*) for the second defendant.
L Andrew (*Andrew & Co*) for the third defendant.

Cur Adv Vult

Jeffrey Tan JC: In the trial of this action, the plaintiffs claimed that an indenture dated 27 January 1965 that brought about the conveyance of four pieces of land held under Lots 58(1), 58(4), 58(5) and 180(48) Mukim 2, South West District Penang in Statutory Grant No 15973, Statutory Land Grant No 9429, Statutory Grant No 10052 and Statutory Land Grant No 19375 ('the lands') was not that of Goh Kim Cheow, their late father ('the deceased'), the owner of the lands at the material time and sought relief, the effect being: (i) the setting aside of the conveyance to the second defendant; (ii) the setting aside of the transfer of title of the lands by the second defendant to the third defendant; and (iii) the reconveyance of the lands to the estate of the deceased who died on 30 September 1965.

Trial commenced on 21 May 1996, but was left unconcluded as the learned judge who commenced the trial was transferred from the High Court at Penang to the High Court at Kuala Lumpur.

On the further conduct of commenced but unconcluded proceedings, s 18(2) of the Courts of Judicature Act 1964 ('the CJA') provides:

> Whenever any judge, after having heard and recorded the whole or any part of the evidence in proceedings, is unable through death, illness or other cause to conclude the proceedings, another judge may:
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> (a) continue with the proceedings from the stage at which the previous judge left it; and
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> (i) act on the evidence already recorded by the previous judge; or
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> (ii) act on the evidence partly recorded by the previous judge and partly by himself; or

(b) resummon the witnesses and recommence the proceedings. A

Even with the enabling powers, the continuation of proceedings by another judge requires the consent of the parties (see O 35 r 11 of the Rules of the High Court 1980), and if the required consent is not given by any one party, the unconcluded proceedings would be heard de novo.

In the instant case, all parties gave that consent, and trial continued B from the stage where it was left off — completion of PW3's testimony, with the plaintiffs recalling PW2 and PW3. That was followed by the testimony of the plaintiffs (PW4 and PW5), whereupon conclusion, the plaintiffs closed their case. The witnesses who testified for the respective defendants were Sonni Pillai (D2Wl) (the city secretary to the second defendant at the C material time); Wembley Alexandria Goh (D1W2), an advocate and solicitor then practising in the law firm of GH Goh & Co of Penang; Khoo Heng Choon, an advocate and solicitor (D1W3) (the assistant city secretary (legal) to the second defendant at the material time); Kim Lim Chong (D2W4) (the second defendant's financial officer) and Abdul Samad bin Husai (D3W5) (the secretary to the third defendant). D

In addition to the testimony of their respective witnesses, each party placed before the court a bundle(s) of documents (PB1 and PB1A by the plaintiffs; DB1 and DB1A by the first defendant; DB2 by the second defendant and DB3 by the third defendant) formal proof thereof was, by consent, dispensed with by the parties. E

The facts not in dispute were that: (i) the deceased was the registered proprietor of the lands; (ii) the second defendant acquired title to the lands by the indenture; (iii) D1W2 attested the execution of the indenture; (iv) the third defendant, the current registered proprietor, acquired title to the lands pursuant to the provisions of the Penang Water Authority F Enactment 1972, and was statutorily vested under s 416 of the National Land Code 1965 ('the NLC 1965') with the lands abutting or supporting water catchment areas listed in DB3(10–23); and (v) the second defendant was compensated by the third defendant for the loss of its lands.

Other undisputed facts as well as disputed facts pertinent to the issues will be indicated in the course of this judgment. However, it can be G said from the onset, *qui non negat fatetur* and *qui tacet consentire videtur* that the facts in a common document and not challenged were facts, accepted or undisputed.

The first plaintiff testified that his mother had died on 22 May 1991. Prior to her death, she had told him that the lands were 'taken away'. He H asked her what she meant by 'taken away' but she merely replied, 'tek keeh' — meaning 'taken away' in the Hokkien dialect. After his mother had passed away, in 1991, he opened the safe in his parents' shop, known as 'Kim Yew & Co' at Nos 266 & 270, Prangin Road, Georgetown. In that safe, he found four quit rents (P12(1)–P12(4)) relating to the lands and I the documents found in pp 5–31 of the plaintiffs' bundle of documents (PB1(5–31)). On document PB1(5–31), the first plaintiff testified that it was a photocopy of a sale and purchase agreement dated 14 November 1964 apparently between the deceased as vendor of the lands of the one

part and the City Council of Georgetown (DW2) as purchaser of the other part. He showed the photocopy of the sale and purchase agreement ('the agreement') to his elder sister, the second plaintiff, who intoned after her inspection of the agreement that their father would not have entered into the agreement. His suspicion aroused, he instructed solicitors who conducted a title search on the lands and who gave to him a photocopy of an unstamped copy of an indenture (PB1(40–41)) ('the unstamped indenture') that the deceased had purportedly executed and signed to which D1W2 had attested. He testified that the three Chinese hieroglyphic characters in PB1(p 41) was not the signature of the deceased, and he tendered, in PB1(7–9), a photocopy of the deceased's passport bearing a signature below the deceased's photograph and building plans with the signature of the landowner that he said was the usual signature of the deceased.

The second plaintiff, a businesswoman, 11 years older than the first plaintiff, testified that she had assisted the deceased in his business whilst the deceased was alive. Having seen the deceased's signature on countless bills, invoices and cheques, she was familiar with the deceased's signature; but the three Chinese characters in PB1(41), she testified, was not the usual signature of the deceased.

A handwriting expert (PW1) who examined, at the request of the plaintiffs, photocopies of: (i) the said agreement; (ii) the unstamped indenture; and (iii) three copies of building plans said to have been signed by the deceased, and was summoned to court by the plaintiffs, testified it was not probable that the person who wrote the three Chinese characters in PB1(41) was the same person who had signed 'Goh Kim Cheow' in the agreement (PB1(5–6)). He tendered a report (P1) on his examination and his findings.

Section 45(1) of the Evidence Act 1950 ('the EA 1950') provides that:

> ... when the court has to form an opinion upon a point of ... or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled ... in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts',

and sub-s (2) calls such persons 'experts'.

On the weight to be given to the evidence of experts, the general rule is that experts cannot be permitted to decide for the court (see *Re Choo Eng Choon (deceased), Choo Ang Chee v Neo Chan Neo & Ors* (1908) 12 SSLR 120 at pp 185 and 208) as it is the court's task, having evaluated an expert's opinion evidence like all other evidence, to come to its own conclusion. In *Wong Swee Chin v PP* [1981] 1 MLJ 212, the Federal Court, per Raja Azlan Shah CJ (as his Lordship then was), enunciated, forcefully too, at p 214 as follows:

> But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it is a judge or jury, which is required to weigh all the evidence and

> determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.

The plaintiffs contended that the purported signatures of the deceased in both the agreement and unstamped indenture were not that of the deceased; there were signatures, however, on the deceased's passport and on the building plans that all parties accepted were undoubted signatures of the deceased ('the admitted signature'). As this court was competent so to do (see s 73 of the EA 1950), the admitted signature of the deceased was compared with the impugned signatures to ascertain whether the signatures on the agreement and the unstamped indenture were indeed that of the deceased by whom it was purported to have been executed. It was observed, effortlessly even to the untutored eye (see *Ng Yik Seng & Anor v Perwira Habib Bank Bhd* [1980] 2 MLJ 83), that there was a great variation between the admitted signature and the three Chinese characters in the unstamped indenture, and that plainly and obviously the three Chinese characters in the unstamped indenture could not have been the signature of the deceased.

The same, however, could not be said of the impugned signature on the agreement, as there was an unusual similarity between the admitted signature and the impugned signature on the agreement, such that by visual comparison alone it was not possible, unlike the three Chinese characters where the variation was too arresting to be debated seriously, to determine if the impugned signature on the agreement was or was not that of the deceased. On that signature in the agreement, the pertinent finding of the handwriting expert (see PB1(51)) was, 'while definite conclusion cannot be reached, the probability of the questioned signature in GGC-1 having been a genuine signature cannot be ruled out'. The third and final finding by the handwriting expert (see PB1(53)) was that 'on the balance of probabilities, the evidence indicates that the author of the questioned signature in GGC-2 (the said indenture) could not have been the writer of the specimen signatures in GGC-3 to GGC-6'.

It is the counsel of the learned authors of *Sarkar on Evidence* (14th Ed, Vol 1) at p 808 and it has been long standing that:

> ... expert evidence must always be received with great caution, but perhaps none more so with caution than the opinions of handwriting experts.

In the local context, the same circumspection can be detected in (i) *Teng Kum Seng v PP* [1960] MLJ 225 and *Dr K Shanmuganathan v Periasamy s/o Sithambaram* [1994] 2 CLJ 225, where it was held that the evidence of handwriting experts is always of very questionable value, particularly in the case of Chinese characters; and (ii) *PP v Mohd Kassim bin Yatim* [1977] 1 MLJ 64, where it was held that the evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty and be conclusive.

There was no difficulty, however, for the court to accept the three primary findings of PW1, as the main protagonists, quintessentially the plaintiffs and first defendant, accepted without demur all three primary

findings (the introduction of PW1's evidence was the plaintiffs' express acceptance whilst the absence of challenge by the first defendant was the first defendant's unspoken yet intelligible acceptance) and PW1's findings were not incompatible with the court's conclusions, as stated hereinbefore: (i) the three Chinese characters in the unstamped indenture could not have been the signature of the deceased; and (ii) by a comparison of the admitted signature and the impugned signature in the agreement, it was not possible to determine if the impugned signature in the agreement was or was not that of the deceased.

To recapitulate, the three primary findings of the handwriting expert, now rephrased, were:

(i) the probability that the deceased had signed the agreement could not be ruled out (see PB1(51));

(ii) on a balance of probabilities, the three Chinese characters in the unstamped indenture could not have been made by the deceased (see PB1(53–54)); and

(iii) on a balance of probabilities, the author of the impugned signature in the agreement could not have signed the impugned signature in the unstamped indenture.

It is now necessary to give a brief outline of the law governing 'the transfer of the lands from the deceased to the second defendant'. Under the Conveyancing and Law of Property Ordinance (Cap 118) applicable to the state of Penang prior to the coming into force of the NLC 1965, the execution of a formal conveyance acted to pass the legal estate of the vendor to the purchaser whilst the registration of a dealing acted merely as a public record of the transaction and was ineffectual to create an estate in land. A vendor's title was ascertained by an investigation of all dealings with a title back for 40 years (later amended to 30) and if any document in the chain of title over this period was missing or invalid, a purchaser could not obtain a good title even if the purchaser had registered a memorial evidencing the conveyance (see Judith Sihombing, *National Land Code: A Commentary* (2nd Ed, 1992, Chp 7). That being so, a register of land dealings, first introduced by the Straits Land Act 1839 (see Judith Sihombing, *National Land Code: A Commentary* (2nd Ed, 1992, at p 8) and continued under the Registration of Deeds Ordinance (Cap 121) by the Registry of Deeds, Penang should not be confused with the Interim Register maintained under s 31 of the National Land Code (Penang & Malacca Titles) Act 1963 where 'the registration of an instrument of dealing shall have the same effect as regards the indefeasibility of the title or interest thereby transferred or created as the registration of an instrument of dealing under the National Land Code' (see s 76 of the Nantional Land Code (Penang and Malacca Titles) Act 1963).

Both the NLC 1965 and the National Land Code (Penang & Malacca Titles) Act 1963 only came into force on 1 January 1966, and under the Conveyancing and Law of Property Ordinance (Cap 118) governing the conveyance in question, the 'unstamped indenture' (PB1(40–41)) taken from the register of dealings was a memorial, a record of a conveyance, but

not the conveyance that passed the deceased's title to the second defendant. Indeed, the Deputy Commissioner of Land Titles, Penang attached to the office of the Director of Lands and Mines, Pulau Pinang (PW2) testified that PB1(40–41) was a memorial of an original indenture, and PB1(40–41) was filed onto the register after it was ascertained, by a comparison of the memorial and the original instrument, that the memorial accurately represented the original instrument. There was no need, he said, for a memorial to be stamped or executed.

Producing the relevant volume (SW2, Vol 5) from the register for inspection, PW2 testified that both the memorial (PB1(40–41)) and the original instrument were presented on 11 February 1965, and that in the normal course of events the original stamped and executed indenture would have been returned to the purchaser. He also testified that the memorial (PB1(40–41)) would not have been accepted for registration if the original instrument was not properly executed, attested and stamped or if the memorial was not an accurate memorial of the original instrument.

PW2's testimony prompted a consideration of s 114 of the EA 1950 that reads:

> The court may presume the existence of any fact which it thinks likely to have happened, regard having been had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case.
>
> ILLUSTRATIONS
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> The court may presume:
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> (a) ...
>
> (b) ...
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> (e) that judicial and official acts have been regularly performed.

The following cases illustrate a judicial and/or official act: (i) *Borneo Housing Mortgage Finance Bhd v Ngu Kie Chi & Anor* [1991] 3 CLJ 2848, where in the absence of a disclaimer of receipt of a notice served by AR post, it was held by virtue of s 114(e) that the postal authorities had performed their duties normally and had therefore served the notice; (ii) *Malayan Banking Bhd v Chua Keng Leng (t/a New Fortune Enterprise)* [1991] 3 CLJ 2522, where the land charge was registered, and it was inferred that the title deed and the powers of attorney under which the documents were signed were duly deposited with the registering authority; (iii) *PP v Kek Leong Peng* [1992] 1 CLJ 696, where a government chemist who analysed a quantity of illicit drugs was presumed to have taken the necessary precautions to ensure that the representative sample he removed was not tampered with in order to be able to carry out a correct analysis in the regular performance of his official act; (iv) *Chiat Kian Rubber Works Sdn Bhd v Southern Finance Co Bhd & Anor* [1992] 1 CLJ 402, where it was presumed in an application to vary the reserve price of a land to be auctioned that the chargor had defaulted, and that the chargee had complied with the provisions of the NLC with respect to the obtaining of an order for sale; (v) *Ramli bin Kechik v PP* [1986] 2 MLJ 33, where the then

Supreme Court held that it could be presumed that when the court orders exhibits to be handed to the police, such judicial and official acts have been regularly performed and that the unbroken chain may be presumed until the contrary is proved.

There was no doubt whatsoever that the maintenance of the register of land transactions, undeniably a public record, by the Registry of Deeds Penang was an official act as the conditions precedent were proved (see *Choo Ah Pat v Chow Yee Wah* [1974] 1 MLJ 62), it was presumed since the contrary was not proved, the presumption augmenting the weight of PW2's testimony that in the common course of the 'registration' of the memorial onto the register and the memorial in the common course would not have been registered if not for full compliance with the provisions of the Registration of Deeds Ordinance (see s 15 of the Ordinance):

(i) the memorial (PB1(40–41)) was compared with a stamped and executed indenture;

(ii) the memorial faithfully reflected the contents of the stamped and executed indenture;

(iii) the stamped and executed indenture was duly stamped and executed; and

(iv) the stamped and executed indenture was returned to the second defendant (this fact presumed solely for completeness as D1W3 had admitted in his testimony that the second defendant received the stamped and executed indenture after the memorial was registered).

D1W3 also shed much light on the three Chinese characters. He testified that he prepared the memorial (PB1(40–41)) and instructed a Chinese translator in the employment of the second defendant, one Foo Yeow Tatt, to write the three Chinese characters onto PB1(41). He explained that the three Chinese characters were written as to reflect the signature in Chinese on the stamped and executed indenture. He also testified that he instructed his office to register the memorial (PB1(40–41)), and that the stamped and executed indenture was returned to the second defendant after 'registration' of the memorial. The three Chinese characters in the memorial and its absurd difference with the admitted signature of the deceased were satisfactorily accounted for although D1W3 was not supported by Foo Yeow Tatt (PW6) who said he had not written the three Chinese characters. (At this juncture, the stamped and executed indenture will be referred to as 'the indenture' and the unstamped indenture will be referred to as 'the memorial'.)

The enigma was the elusive indenture. That the plaintiffs applied (although not to the second and third defendants) but were not given a copy of the indenture was not in dispute. Both D2W4 and D3W5 testified that the indenture could not be located; the indenture was handed to the third defendant in 1972 when the third defendant was vested with the lands in 1972; it was surrendered when the third defendant obtained advance certificates of titles that replaced the indenture in 1986. That however was not the final word on the indenture, as PW3 who confirmed the issuance of three advance certificates of titles to the third defendant testified that the

indenture could not have been surrendered as the fourth lot was not issued with an advance certificate of title. A

Few, if not none, would argue that the production of the indenture, or a copy made from the original (for the admission of a copy of the indenture, see s 65(1)(a)(i), (b), (c), and the court's discretion to admit it under s 66(b), (c) or (d) of the EA 1950) and proof of the required standard that the signature on the indenture was not that of the deceased, by whom it was purported to have been executed, were not of importance to the plaintiffs' case. It was imperative, by the very character and substance of the plaintiffs' claim, that the indenture or a copy was produced. However, neither the handwriting expert nor any other handwriting expert, and more importantly, the court, had sight of the indenture and the impugned signature, and it is stating the obvious that without the indenture there was no proof whatsoever that the signature in the indenture was or was not that of the deceased. B C

It is basic, *actori incumbut probatio*, that he who asserts, be it in civil or criminal proceedings, must prove (see s 101 of the EA 1950) and the burden of proof lies on that person 'who would fail if no evidence at all were given on either side' (see s 102 of the EA 1950). The judgment that the plaintiffs sought was dependent *in integrum* on the existence of the fact that they alleged — the indenture was not executed by the deceased. As the existence of that fact was one that the plaintiffs wished the court to believe (see s 103 of the EA 1950) and as the plaintiffs' action 'would fail if no evidence at all were given on either side' (see s 102 of the EA 1950), the plaintiffs had the burden of proof; as there was an allegation of fraud, the proof required was not of a civil standard but that beyond a reasonable doubt that the signature in the indenture was not that of the deceased (see *Saminathan v Pappa* [1981] 1 MLJ 121 and *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35). D E F

What was before the court and what the handwriting expert examined was the memorial rather than the indenture. Admittedly, the three Chinese characters in the memorial was not the deceased's signature; yet given the totality of the evidence, it could not at all be said that because the three Chinese characters was not the deceased's signature (established fact), a further fact that the deceased had not executed the indenture was proved. G

To be fair to the plaintiffs, it could be argued however that they had little else to go by. According to the first plaintiff, he had tried to obtain a copy of the indenture from the Registry of Deeds but he was 'turned away'. If that was so, it could be further argued, fairly even, that it was not the plaintiffs' fault or default that they had to make do with the best available material — the memorial. Taking the argument one step further and in giving the plaintiffs the best possible inference from the same set of facts, namely, that the indenture was denied to the plaintiffs and that the defendants knew they were required to produce the indenture, it could be presumed that the indenture, even if produced, would be unfavourable to the second and third defendants (see s 114(g) of the EA 1950) and that the indenture if produced, would prove the plaintiffs' assertion. H I

A However, the conditions precedent were not fulfilled and there was no case to invoke s 114(g). Nevertheless, even on the assumption, for the sake of argument, that the conditions precedent were fulfilled and s 114(g) could be invoked, it must yet be asked if the adverse inference flowing therefrom — that the said indenture was not executed by the deceased — would be consistent with: (i) the plaintiffs' evidence; and (ii) the evidence B in general, and whether the plaintiffs' evidence would admit that adverse inference. Much was answered by a silent witness — the safe in the deceased's shop.

According to the plaintiffs, the documents (PB1(5–31)), were found in a safe in their parents' shop. Those documents concerning the said C lands in chronological order from (1)–(8) were:

(1) the second defendant's letter dated 1 July 1964 to the deceased (PB1(24)) notifying the deceased of the second defendant's application to acquire compulsorily the lands;

D (2) the second defendant's letter dated 14 September 1964 to GH Goh & Co (PB1(25)) agreeing to purchase the lands at the price of RM26,000;

(3) the second defendant's letter dated 19 September 1964 to GH Goh & Co (PB1(26)): (a) acknowledging the receipt of GH Goh & Co's letter dated 15 September 1964; and (b) informing GH Goh & Co E that the second defendant would be preparing the sale agreement in respect of the lands;

(4) the second defendant's letter dated 23 October 1964 to GH Goh & Co (PB1(27)): (a) acknowledging the receipt of GH Goh & Co's letter dated 22 October 1994; (b) informing GH Goh & Co that the F second defendant was preparing the sale agreement and that the purchase would be completed within one month from the date of the State Authority's sanction; and (c) requesting for the title deeds to be forwarded to the second defendant;

(5) GH Goh & Co's letter dated 26 October 1964 to the second defendant G (PB1(28)): (a) acknowledging the receipt of the second defendant's letter dated 23 October 1964; and (b) forwarding to the second defendant the title deeds in respect of the lands;

(6) the second defendant's letter dated 27 October 1964 to GH Goh & Co (PB1(29)): (a) acknowledging the receipt of GH Goh & Co's letter of 26 October 1964 and the title deeds forwarded; and (b) H enclosing a draft sale and purchase agreement in respect of the lands;

(7) the agreement dated 14 November 1964 (PB1(5–6));

(8) GH Goh & Co's letter dated 19 March 1965 to the second defendant (PB1(31)) forwarding the mortgagee's deed of reconveyance (PB1(32–I 34)) of the lands.

The other documents in the safe were:

(9) the deceased's passport (PB1(7–9));

(10) four sets of building plans (PB1(10–13)); A

(11) the grant of probate for the administration of the deceased's estate, with the deceased's will annexed (PB1(14–16));

(12) the plaintiffs' letters of administration de bonis non for the administration of the deceased's estate (PB1(17–19));

(13) an indenture of statutory mortgage dated 29 May 1952 created by the deceased in respect of two other pieces of lands (PB1(20–21)). B

It was obvious by the personal nature of documents (9)–(13) that the safe that the first plaintiff opened was a safe used by the deceased, and to a lesser extent by the deceased's wife — the first plaintiff said he opened the safe after his mother had passed away. That settled, then it must be asked: C

(1) if it was at all likely that documents (1)–(8) could end up in a safe in the deceased's business premises if the deceased had not executed the agreement and indenture and had no knowledge of the transfer of the lands to the second defendant;

(2) was it more probable that documents (1)–(8) were kept in the safe as it formed the record of a transaction, much as document (13) on a reasonable deduction would have been such a record, or was it more probable that it was kept for some unspecified purpose, perhaps — in the light of the plaintiffs' assertion of fraud and forgery — as the evidence of the forgery that would be reported at some time in the future; D E

(3) on the assumption that the deceased was truly defrauded of his lands, why were documents (1)–(8) deposited in a safe, and for God knows how long, in a state of inactivity when the documents (1)–(8) spoke only of the transfer of the lands; and F

(4) would it not be a reasonable supposition that none of the documents (1)–(8) would be in the safe if the deceased had not executed the agreement and indenture.

As none could be resolved in the plaintiffs' favour, it was clear that: (i) even if the conditions precedent to 114(g) of the EA 1950 were fulfilled, G an adverse inference would have been invoked as the total evidence was the proof to the contrary and it would not admit such an inference; and (ii) the plaintiffs' assertion was more of an improbability than a probability. As it transpired, the other evidence from the plaintiffs accentuated the improbability.

H

It is now an opportune moment to revisit the common law deeds system where a vendor's title was ascertained by an investigation of all dealings with a title back that required a vendor's production of all documents in the chain of title. It was not in dispute that the deceased had conveyed by mortgage the lands to one Hock Lye Co Ltd on 22 January 1955 (see PB1(30) and PB1(33–35)) — under the common law deeds I system, the mortgagee Hock Lye Co Ltd would have possession of all documents in the chain of title, namely the six conveyances/documents from 1935–1955 (see PB1(30)) — the title back for 30 years. With the

latter in perspective, three other undisputed facts, videlicet: (i) the mortgagee reconveyed the lands to the deceased on 2 January 1965 (see PB1(32–35)); (ii) the second defendant wrote directly to the deceased on 1 July 1964 (see PB1(24)); and (iii) PB1(25) which was the reply to PB1(24), came forth with added weight and importance.

The second defendant's notice of the intended acquisition of the lands (PB1(24)) was addressed to the deceased, and in the common course of delivery would have been received by the deceased; in any event it would not and could not have reached GH Goh & Co. Of the documents before the court, the letter from GH Goh & Co (PB1(25)) offering the sale of the lands to the second defendant was the first letter that the second defendant received from GH Goh & Co. PB1(25) was silent as to whether it was a reply to PB1(24) but D2W1 testified that PB1(25) was the reply to the notice (see p 23 of the notes of evidence). As for the writer of PB1(25), she (D1W2) testified that the deceased consulted her on PB1(24). The deceased, she said, was reluctant to sell but was willing to sell it for RM26,000. The deceased instructed her to write PB1(25), and she did as she was instructed. The deceased's offer was accepted, and the second defendant prepared the necessary documentation (corroborated by D2W1 and D1W3). She said the deceased executed the agreement and indenture in her presence. She also related the correspondence between the second defendant and GH Goh & Co, her dispatch of the executed agreement, the executed indenture and the deed of reconveyance to the second defendant. All of the latter as well as the rest of D1W2's testimony touching upon the second defendant were corroborated by D2W1 and D1W3.

Notwithstanding the testimony of D2W1 and DlW2 and the plaintiffs' admission by their counsel during submission that PB1(25) was a reply to PB1(24), it must be said that on a balance of probabilities, PB1(25) could only have been a reply to the notice, as the coincidence of the second defendant and GH Goh & Co corresponding on the same lands with one to acquire and the other to sell all within the same month, was less than probable. That PB1(25) was a reply to PB1(24) compelled the inevitable deduction that the deceased had consulted GH Goh & Co on the notice. D1W2's testimony that the deceased consulted her on the notice was therefore corroborated by the documents. That the deceased consulted GH Goh & Co was also relevant for another reason. It was implied in the plaintiffs' assertion — the deceased had not executed the agreement and indenture — that the deceased's instructions were not given for the conveyance of the lands to the second defendant; it could not have been otherwise as the plaintiffs' admission that the deceased's instructions were given would not advance the plaintiffs' case. Yet once again the probabilities were not in the plaintiffs' favour; that the deceased consulted D1W2 on the notice and that the reply to the notice was an offer for the sale of the lands intensified and did not diminish the likelihood that the deceased's instructions for the conveyance of the lands was probably given.

The litany of woes in the plaintiffs' case was yet not at an end. The first plaintiff testified that his mother had told him that the lands were

'taken away'. The testimony of both D2Wl and DlW2 were that the deceased, duly notified of the second defendant's application to acquire the lands, offered the lands for sale. Although the out-of-court statement by the plaintiffs' mother, 'taken away', as proof of the facts asserted was hearsay evidence and was not admissible, it was however admissible as proof of the fact that such a statement was made by the deceased's wife to the first plaintiff (see *Subramaniam v PP* [1956] 1 WLR 965 and *Ratten v R* [1972] AC 378). However, that evidence offered scant comfort to the plaintiffs' cause as the ordinary meaning of the words 'taken away' was closer to 'acquisition' — is acquisition not a form of taking away? — and more consistent with the defence's version of an intended acquisition than 'stolen', 'cheated', 'defrauded' or whatever other word or abbreviation in the Hokkien dialect approximating the plaintiffs' assertion that the deceased's wife could have used.

Considering furthermore that the lands were mortgaged at the material time and that the title deeds and deed of reconveyance would not have been with GH Goh & Co unless those in lawful custody had released it, and for the grounds given hereinbefore, it was improbable that the indenture was not executed by the deceased.

The plaintiffs based their claim on a memorial they said was forged. In the words of learned counsel for the plaintiffs in his oral submission, 'the plaintiffs' claim is that the purported signature of the deceased vendor now appearing in PB1(40–41) (the memorial) is a forgery'. With respect, that statement of the plaintiffs' claim epitomized the plaintiffs' utter failure to appreciate that a memorial was not required to be stamped, executed or attested, that the memorial was not the instrument that conveyed the lands to the second defendant, and that proof, however conclusive that the said memorial was not the deed of the deceased, was not sufficient proof that the deceased had not executed the indenture.

The pathetic state of the plaintiffs' case was also epitomized by the inference urged upon the court during submissions that 'the three Chinese characters in the memorial must have been the same as the characters in the indenture'. That, however, was a cruel invitation to perilous conjecture, as the said memorial was not an identical duplicate of the indenture; if the said memorial in its unstamped, unsigned and unattested form was an identical duplicate, then the indenture would not have been stamped, signed and attested; and would not, on the balance of probabilities, have been enrolled onto the register of dealings.

Where the plaintiffs had the burden of proving beyond a reasonable doubt, they had not even made out an arguable case on a balance of probabilities. They counted on: (i) a memorial that proved irrelevant; (ii) a handwriting expert's findings that did not support their case that the said agreement was not executed by the deceased; and (iii) evidence that did not support their assertion that the indenture was not executed by the deceased. To top it all, the veracity of the first plaintiff was questionable. The first plaintiff testified that in 1991 he opened the safe in his parents' shop and found in that safe four quit rents (P12(l)–(4)) and the documents

A (PB1(5–31)). However, it was completely overlooked by the first plaintiff that the letters of administration de bonis non (PB1(17–19)) were only granted in 1993 and could not have been in the safe as he had testified. Fairly said, the plaintiffs' assertion was no more than a bare and baseless assertion.

B The plaintiffs not having proved their case and the defendants *actore non probante absolvitur reus* accordingly assoilzied, there is no real need to dwell at any length on the defence. A short summary of the defence is all that is necessary to show the utter destitution and hopelessness of the plaintiffs' action.

C In the respective statements of defence, it was pleaded, inter alia, that the plaintiffs had no cause of action against the first defendant and that the second and third defendants were bona fide purchasers. It was not in disagreement that the firm of solicitors concerned in the conveyance was GH Goh & Co. The 'wrong' the plaintiffs complained of was that of GH Goh & Co, and the proper parties to answer and account for that D alleged 'wrong' were: (i) GH Goh & Co; or (ii) Goh Guan Ho and Joy Goh, the partners of GH Goh & Co at the material time. But that was not to be, as the plaintiffs instituted an action against the first defendant (Syarikat Goh Guan Ho), a firm that only came into existence in 1969, that is well after the conveyance in question, whose present partners (D1W2 and Philip Hoalim) were but legal assistants of GH Goh & Co at E the material time. Much was made out by the plaintiffs on the father and daughter relationship between Goh Guan Ho and D1W2. According to the plaintiffs, the first defendant 'succeeded' GH Goh & Co. There was no evidence, however, that the first defendant had 'succeeded' or had assumed the liabilities of GH Goh & Co. On the contrary, the evidence proved the F separate identity of the first defendant. Founded in 1969 by D1W2 and her husband Philip Hoalim with chambers at Beach Street, its separate identity was none more apparent nor evident than in 1969, when it existed alongside GH Goh & Co at Church Street for a few short months until the demise in November 1969 of Goh Guan Ho, the last remaining partner of GH Goh & Co. The first defendant's plea that the plaintiffs simply had no G case was therefore fully vindicated. As for the second and third defendants, their witnesses' testimony that the conveyance to the second defendant and the statutory vesting to the third defendant were all done in accordance with law and that the second and third defendants had no knowledge of any fraud proved and that it was not even challenged.

H The plaintiffs' action, to borrow the label from *Karpal Singh v Atip bin Ali* [1987] 1 MLJ 291, was 'conspicuously unmaintainable'. However, none of the defendants applied for the costs of the proceedings to be personally paid by the solicitor; they applied instead for the costs to be paid by the plaintiffs and not out of the deceased's estate.

I The plaintiffs who applied for and were granted letters of administration de bonis non instituted the litigation as the representatives of the deceased. On actions by personal representatives, the following two

passages are found in 17 *Halsbury's Laws of England* (4th Ed) at paras 1560 and 1562:

> 1560 — it is advisable for a personal representative before bringing or defending an action to obtain the consent of all the beneficiaries ... or to seek the court's direction. If the beneficiaries' consent or the court's sanction is not thus obtained, the personal representative litigates at his own risk as to costs in the sense that he may be deprived of his right to be indemnified out of the estate if the court considers that he acted unreasonably in prosecuting or defending the action.
>
> 1562 — in ordinary cases a personal representative who sues as such and fails is personally liable for the costs of the action, the judgment against him will be that the defendant recover the costs to be levied *de bonis propriis* but this will not preclude the personal representative from indemnifying himself from the estate ...

In *Ganapathy Chettiar v Periakaruppan & Anor* [1962] MLJ 207, the Privy Council, per Lord Radcliffe at p 211, extended the following advice to executors and administrators:

> Prima facie, an executor or administrator who appears on an appeal for the purpose of supporting a judgment which has been made in his favour by the lower court does not act unreasonably and there therefore must be some presumption to be displaced before the court deprives him of his costs out of the estate if he is unsuccessful. The prudent course is for an executor, administrator or trustee to furnish himself with legal advice before taking part in the legal proceedings and to lay before the court in chambers and ask for its directions before committing himself further. If he does not do that, he may find himself incurring liability for costs to a successful opponent without any certainty that he would be allowed later to indemnify himself out of the estate. But it is a strong measure to deprive him of any right to indemnity where he has merely defended his existing judgment and in the absence of any detailed knowledge of what governed his actions.

It was, however, not in defence of the deceased's 'estate' that the plaintiffs pursued their reckless action. In his last will (PB1(16)), the deceased appointed the plaintiffs' mother as his sole executor and the sole beneficiary of his estate. In time, she petitioned for the administration of the deceased's estate. However and this is particularly significant, in her petition for the grant of probate, she did not list the lands in the schedule of assets (PB1(15)) annexed to the relevant grant of probate, when most reasonably she would have done so, since her personal interests were at stake, if the lands were part of the deceased's estate. Therefore, the estate that the deceased's appointed executor administered knew not of the lands. It was only when the plaintiffs petitioned for the grant of letters of administration de bonis non that the lands appeared in the schedule of assets of the deceased (PB1(18)). Unquestionably, the plaintiffs entered into litigation when the subject matter they claimed for the deceased's estate was not at all administered by the deceased's executor/sole beneficiary, that clearly indicated that the plaintiffs were out on an adventure, and a risky one at that, all on their own.

A Considering that the beneficiaries' sanction was not shown and the court's sanction was not obtained for an action that was 'conspicuously unmaintainable' and that the plaintiffs could not confirm that the deceased's estate would be able to discharge the costs of the proceedings if awarded against the estate, and that the plaintiffs had acted unreasonably in the prosecution of the action, it would be entirely iniquitous if the plaintiffs, from the sanctuary of an 'estate action', would even deny costs to the defendants.

For the reasons above, the plaintiffs' claim is dismissed with the costs of this proceedings to be paid by the plaintiffs personally.

C *Claim dismissed.*

Reported by Kenneth Goh

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